

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Threshold Fair Distribution Analysis of
Mutually Exclusive Applications of The
Blackfeet Tribe of the Blackfeet Indian
Reservation of Montana and Holy Spirit Radio,
Inc. for Permits to Construct New
Noncommercial Educational FM Stations Filed
in November 2021 Window
MX Group 131
File No. 0000165933
File No. 0000167236

MEMORANDUM OPINION AND ORDER

Adopted: March 2, 2022

Released: March 2, 2022

By the Chief, Audio Division, Media Bureau:

I. BACKGROUND

1. The Media Bureau (Bureau) has before it for comparative consideration two mutually exclusive (MX) applications for new noncommercial educational (NCE) FM station construction permits. By this Memorandum Opinion and Order (Order), the Bureau performs a threshold Tribal Priority analysis and identifies the Blackfeet Tribe of the Blackfeet Indian Reservation of Montana (Blackfeet Tribe), proposing a new NCE FM station at Little Browning, Montana, as the tentative selectee in MX Group 131. Petitions to deny the application of this tentative selectee must be filed within 30 days of the date of release of this Order.

2. The group addressed in this Order consists of applications that were filed in November 2021, during the filing window for NCE FM applications. In addition to the Blackfeet Tribe, MX Group 131 includes Holy Spirit Radio, Inc. (Holy Spirit), which proposes a new NCE FM station at Conrad, Montana. These applicants have had an opportunity to settle among themselves, and are now subject to a simplified, comparative process codified in Part 73, Subpart K, of the Commission's rules. During the

1 On November 29, 2021, the Bureau issued a public notice identifying 231 groups of mutually exclusive NCE FM applications. See Media Bureau Identifies Groups of Mutually Exclusive Applications Submitted in the November 2021, Filing Window for New Noncommercial Educational Stations, MB Docket No. 20-343, Public Notice, DA 21-1476 (MB rel. Nov. 29, 2021) (NCE MX Public Notice). MX Group 131 was included in the NCE MX Public Notice.

2 File No. 0000165933.

3 See 47 CFR § 73.7004(b).

4 See Media Bureau Announces NCE FM New Station Application Filing Window; Window Open from November 2, 2021, to November 9, 2021, MB Docket No. 20-343, Public Notice, 36 FCC Rcd 7449 (MB 2021). The window was available for FM reserved band (channels 201-220) proposals. See 47 CFR § 73.501.

5 File No. 0000167236.

6 See NCE MX Public Notice at 2-5.

7 47 CFR §§ 73.7000 – 7005.

first step of this process the Bureau, acting pursuant to delegated authority,<sup>8</sup> uses Tribal Priority criteria, service area population data, and certifications provided by the applicants to perform a threshold fair distribution analysis.

## II. THRESHOLD FAIR DISTRIBUTION PROCEDURES

3. Section 307(b) of the Communications Act of 1934, as amended (Section 307(b)) states that the Commission must “provide a fair, efficient, and equitable distribution” of broadcast service among the states and communities.<sup>9</sup> In accordance with this directive, the Commission considers the fair distribution of service as a first, or threshold, issue in its NCE FM comparative review process.<sup>10</sup> Accordingly, when applicants in a mutually exclusive NCE FM group<sup>11</sup> propose to serve different communities, the Bureau first performs a threshold “fair distribution” analysis to ascertain whether grant of any of the applications would best further the Section 307(b) objective.<sup>12</sup> In the first step of the Section 307(b), or fair distribution, analysis, the Bureau determines whether any of the applicants in the MX group is a federally recognized Native American Tribe or Alaska Native Village proposing to serve Tribal Lands.<sup>13</sup> Specifically, an NCE FM applicant is eligible to receive a fair distribution preference (or Section 307(b) preference),<sup>14</sup> and ultimately be awarded the construction permit, if it identifies itself as a Tribal Applicant,<sup>15</sup> proposes Tribal Coverage,<sup>16</sup> and proposes the first reserved channel NCE service owned by

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<sup>8</sup> See *Comparative Consideration of 76 Groups of Mutually Exclusive Applications*, Memorandum Opinion and Order, 22 FCC Rcd 6101, n.16 (2007). See also 47 CFR §§ 0.61 and 0.283.

<sup>9</sup> 47 U.S.C. § 307(b).

<sup>10</sup> See 47 CFR § 73.7002; *Reexamination of Comparative Standards for Noncommercial Educational Applicants*, Report and Order, 15 FCC Rcd 7386, 7396 (2000) (*NCE Order*) (concluding that “fair distribution of stations to communities should remain a threshold issue”), Memorandum Opinion and Order, 16 FCC Rcd 5074, 5077 (2001) (*NCE MO&O*) (“when competing FM applications propose to serve different communities, a proposal would be considered best, as a threshold matter, if it would provide service to a significant unserved or underserved population”).

<sup>11</sup> Conflicting NCE FM applications, which cannot all be granted consistent with the Commission's technical rules, are considered mutually exclusive. An MX group consists of all applications which are MX to at least one other application in the group.

<sup>12</sup> See 47 U.S.C. § 307(b) (“In considering applications for licenses . . . when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.”); 47 CFR § 73.7002(a).

<sup>13</sup> See 47 CFR §§ 73.7000, 73.7002(b).

<sup>14</sup> The terms “fair distribution preference” and “Section 307(b) preference” are used interchangeably to refer to the preference given to an MX application that is deemed to substantially further the fair distribution of service goals enunciated in Section 307(b) of the Act.

<sup>15</sup> See 47 CFR § 73.7000 (defining a “Tribal Applicant” as “(1) a Tribe or consortium of Tribes, or (2) an entity that is 50 percent or more owned or controlled by a Tribe or Tribes that occupy Tribal Lands that receive Tribal Coverage.”).

<sup>16</sup> *Id.* (defining “Tribal Coverage” as “(1) Coverage of a Tribal Applicant's or Tribal Applicants' Tribal Lands by at least 50 percent of a facility's 60 dBu (1 mV/m) contour, or (2) The facility's 60 dBu (1 mV/m) contour (i) Covers 50 percent or more of a Tribal Applicant's or Tribal Applicants' Tribal Lands, (ii) Serves at least 2,000 people living on Tribal Lands, and (iii) The total population on Tribal Lands residing within the station's service contour constitutes at least 50 percent of the total covered population.”).

any Tribal Applicant at a community of license located on Tribal Lands (the Tribal Priority).<sup>17</sup> If only one applicant in an MX group qualifies for the Tribal Priority, its “fair distribution” (Section 307(b)) preference is dispositive,<sup>18</sup> and the applicant will be awarded the construction permit.<sup>19</sup> Each Tribal Applicant must support its fair distribution claim with an exhibit demonstrating its qualifications to claim a Tribal Priority.<sup>20</sup> Any applicant that receives a Tribal Priority and decisive Section 307(b) preference is required to construct and operate technical facilities substantially as proposed, and cannot downgrade service to the area on which the preference was based for a period of four years of on-air operations.<sup>21</sup>

### III. ANALYSIS

4. In the *Rural Radio* proceeding,<sup>22</sup> the Commission concluded that establishing a Tribal Priority for Native American Tribes and Tribal-owned entities would advance its Section 307(b) goals and serve the public interest by enabling Indian tribal governments to provide radio service tailored to the needs and interests of their local communities that they are uniquely capable of providing.<sup>23</sup> The Tribal Priority is available to Tribes proposing, among other things, the assignment of reserved band NCE FM radio stations to serve Tribal Lands.<sup>24</sup> Applicant Blackfoot Tribe certifies that its proposal meets the requirements established in *Rural Radio*, and codified in the rules,<sup>25</sup> for a Tribal Priority. Specifically,

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<sup>17</sup> 47 CFR § 73.7002(b). If there is no Tribal Applicant in an MX group, the Bureau proceeds to the second step in the Section 307(b) analysis and determines whether any applicant would provide a first or second reserved band channel NCE aural service to a substantial population (the First or Second NCE Service Preference) and compares population coverage totals. *Id.* In an MX group with a Tribal Applicant, an applicant qualifying for a Tribal Priority, however, will prevail over any MX applicant claiming a First or Second NCE Service Preference. In such cases, this second step (First and Second NCE Service Preference analysis) is moot.

<sup>18</sup> The Tribal Priority, however, will not prevail over a proposal for a first overall aural reception service to a significant population. *See Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, First Report and Order, 25 FCC Rcd 1583, 1594 (2010) (*Rural Radio First R&O*). We only review and consider a claim that an applicant will provide a first overall aural reception service (*see* FCC Form 2100, Schedule 340, Fair Distribution of Service Section, Question 1) if the application is mutually exclusive with an application claiming a Tribal Priority. *See* FCC Form 2100, Schedule 340, Instructions for Fair Distribution of Service at 12-13.

<sup>19</sup> 47 CFR § 73.7002(b). If two or more Tribal Applicants file MX applications, the one providing the most people with reserved channel NCE service to Tribal Lands will be awarded a construction permit, regardless of the magnitude of the superior service or the populations of the communities of license proposed, if different. *Id.*

<sup>20</sup> An applicant’s fair distribution showing must be computed as of the time of filing (close of the filing window for applications filed prior to the window) and cannot be enhanced thereafter. *See* 47 CFR § 73.7003(e) and (f)(3); *NCE Filing Procedures Public Notice* at 11; *NCE MO&O*, 16 FCC Rcd at 5082-83. However, an applicant that subsequently makes engineering changes that would diminish its fair distribution position must amend its application to reflect that diminished position. *See* 47 CFR §§ 1.65 and 73.7003(e).

<sup>21</sup> *See* 47 CFR § 73.7005(b); *see also* 47 CFR § 73.7002(c). In particular, during this period, any Tribal Applicant, which receives a decisive Section 307(b) preference, cannot “(i) assign or transfer the authorization except to another party that qualifies as a Tribal Applicant; (ii) change the facility’s community of license; or (iii) effect a technical change that would cause the facility to provide less than full Tribal Coverage.” *Id.* § 73.7002(c)(2).

<sup>22</sup> *See Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, Notice of Proposed Rule Making, 24 FCC Rcd 5239 (2009) (*Rural Radio NPRM*); First Report and Order, 25 FCC Rcd 1583 (2010); Second Report and Order, 26 FCC Rcd 2556; and Third Report and Order, 26 FCC Rcd 17642 (2011) (collectively, *Rural Radio*).

<sup>23</sup> *Rural Radio First R&O*, 25 FCC Rcd at 1587, para. 8.

<sup>24</sup> *Id.* at 1596-97, paras. 26-27. *See also Rural Radio NPRM*, 24 FCC Rcd at 5248, n.29 (defining “Indian Tribe[s]” and “Federally-Recognized Indian Tribes”), and n.30 (defining “Tribal Lands”); 47 CFR § 73.7000 (defining “Tribe,” “Tribal applicant,” “Tribal coverage,” and “Tribal lands”).

<sup>25</sup> *See* 47 CFR §§ 73.7000, 73.7002.

Blackfeet Tribe provides evidence that: the Blackfeet Tribe is a federally recognized Native American Tribe; over 50% of the proposed principal community contour (58 out of 110 square kilometers, or 53%) would cover Blackfeet Tribal Land, thus achieving Tribal Coverage; the proposed principal community contour does not cover any Tribal Land other than that belonging to the Blackfeet Tribe; Little Browning, the proposed community of license, is located on Blackfeet Tribal Land; and the proposed facility would be the first local Tribally-owned NCE transmission service at the proposed community of license (and, in fact, the first local NCE transmission service at Little Browning).<sup>26</sup>

5. Holy Spirit, the only other applicant in MX Group 131, is not and does not claim to be a Tribe as defined in section 73.7000.<sup>27</sup> Pursuant to section 73.7002(b) of the rules, “a full-service FM applicant that identifies itself as a Tribal Applicant, that proposes Tribal Coverage, and that proposes the first reserved channel NCE service owned by any Tribal Applicant at a community of license located on Tribal Lands, will be awarded a construction permit.”<sup>28</sup> Thus, under our rules, the Blackfeet Tribe is the tentative selectee in MX Group 131.

#### IV. ADDITIONAL MATTERS

6. **Acceptability Studies.** Once the Bureau identifies a tentative selectee pursuant to the fair distribution analysis, the next step is to consider whether the selectee’s application has defects.<sup>29</sup> If the Bureau finds the application acceptable for filing, we announce acceptance by public notice, and petitions to deny may be filed within 30 days following the release of the public notice.

7. The Bureau has studied the Blackfeet Tribe’s application and has determined that it is acceptable for filing. The Blackfeet Tribe appears to be fully qualified to become the licensee of the new NCE FM station it has proposed. We tentatively conclude that the grant of its application would serve the public interest, convenience, and necessity. It is our intention to grant the application if, after the 30-day petition to deny period has run, there is no substantial and material question concerning the grantability of the tentative selectee’s application. Such determinations of grantability may, of course, involve additional matters that may impact the timing or outcome of a decision. For example, a proposal to serve an area near the United States border with Canada or Mexico cannot become ripe for grant prior to the successful completion of international coordination. Also, in addition to the standard constraints set forth in section 73.7000(c)(1), section 73.7002(c)(2) identifies the specific restrictions pertaining to a Tribal Applicant receiving a decisive preference through a fair distribution analysis.<sup>30</sup>

#### V. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED, that the Application filed by the Blackfeet Tribe of the Blackfeet Indian Reservation of Montana (File No. 0000165933) is TENTATIVELY SELECTED to be awarded a construction permit for a new NCE FM station at Little Browning, Montana, and that its

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<sup>26</sup> See File No. 0000165933, Attachment, “Little Browning 214A Tribal Priority October 2021.pdf.”

<sup>27</sup> 47 CFR § 73.7000. Holy Spirit also does not claim to provide a first overall aural reception service.

<sup>28</sup> 47 CFR § 73.7002(b).

<sup>29</sup> If a tentative selectee’s application is found unacceptable for filing, it is dismissed. The applicant then has one opportunity to submit a curative amendment and a petition for reconsideration requesting reinstatement *nunc pro tunc* within 30 days, provided that the amendment is minor and does not alter the fair distribution analysis. See 47 CFR § 73.3522(b)(1). A tentative selectee that is unable to cure the defect is disqualified.

<sup>30</sup> 47 CFR § 73.7002(c)(1)-(2). Section 73.7002(c)(2) states that, for a period beginning with award of the construction permit through four years of on-air operation, a Tribal Applicant receiving a decisive preference under 47 CFR § 73.7002 may not (i) assign or transfer the authorization except to another party that qualifies as a Tribal Applicant; (ii) change the facility’s community of license; or (iii) effect a technical change that would cause the facility to provide less than full Tribal Coverage. 47 CFR § 73.7002(c)(2).

application is ACCEPTED FOR FILING, establishing a deadline thirty (30) days hereafter for the filing of petitions to deny. If, after the 30-day petition to deny period has run, there is no substantial and material question concerning the grantability of the tentative selectee's application, we intend, by public notice, TO DISMISS the mutually exclusive application of Holy Spirit Radio, Inc. (File No. 0000167236) and TO GRANT the application of The Blackfeet Tribe of the Blackfeet Indian Reservation of Montana (File No. 0000165933) CONDITIONED UPON that selectee's compliance with Section 73.7002(c) of the Commission's Rules,<sup>31</sup> which sets forth a four-year period of on-air operations substantially as proposed.

FEDERAL COMMUNICATIONS COMMISSION

Albert Shuldiner  
Chief, Audio Division  
Media Bureau

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<sup>31</sup> 47 CFR § 73.7002(c).